No. 318.

Brf. of Andrews for Appt.

FILED
APR 7 1902
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Apr. 7, 1902.

No. 318.

J. HENRIETTA HOFFELD, *Executrix of the Estate of* RUDOLPH HOFFELD, *Deceased, Plaintiff,*

vs.

THE UNITED STATES.

For Repayment of $3,200 Under the Act of June 16, 1880. 21 Stats. 287.

Appeal by the Plaintiff from the Decision of the Court of Claims of January 21, 1901.

BRIEF FOR THE PLAINTIFF.

ANDREWS & ANDREWS,
Attorneys for Plaintiff.

LAW REPORTER PRINT.

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STATEMENT OF THE CASE.

May 28, 1886, Harry Jones, J. L. Cole, Chas. L. Weaver and Samy Perri, by William Hinds, their attorney in fact, purchased from the United States the N. E. ¼ Sec., 35 Twp. 14 S., R. 87 W. of the 6th P. M., as entry No. 13, at the United States land office at Gunnison, Colo., paying therefor the sum of $3,200. (Rec. p. 3.)

May 29, 1886, the aforesaid purchasers conveyed said land by William Hinds, their attorney in fact, to the Ohio Creek Anthracite Coal Company for a recited consideration aggregating $4,450. (Rec. p. 4.)

August 29, 1887, a writ of attachment issued out of the county court of Gunnison County, Colorado, in a suit wherein Asenath L. Hinds was plaintiff and the Ohio Creek

Anthracite Coal Company was defendant, and levied upon the aforesaid tract of land, as well as other land belonging to the said company. (Rec. p. 4.)

August 23, 1887, a like attachment was issued out of the district court of Arapahoe County, Colorado, in a suit wherein the Hendric and Balthoff Manufacturing Company was plaintiff and the Ohio Creek Anthracite Coal Company was defendant, and levied upon the aforesaid tract of land, as well as other land belonging to the defendant company. (Rec. p. 4)

November 10, 1887, the aforesaid tract of land and other property were sold by the sheriff of Arapahoe County, Colorado, to Rudolph Hoffeld for a recited consideration of $75, on account of the aforesaid writ of attachment in the suit wherein the Hendric and Balthoff Manufacturing Company was plaintiff and the Ohio Creek Anthracite Coal Company was defendant. (Rec. p. 4)

The affidavit required by section 32 of the Coal Land Regulations, in which it was required to be stated *inter alia* that the entry was made for the benefit of the entryman, was not made by the several entrymen, as required by said regulation, but by the said William Hinds as their attorney in fact. But notwithstanding this defect, the local land officials allowed the entry and accepted the purchase money. Subsequently, on April 12, 1888, this affidavit was held to be insufficient by the General Land Office, and the local land offices were directed to notify the claimants to that effect. No report having been received from the local offices of their action under said instructions, such report was called for by the General Land Office August 11, 1894. (Rec. p. 3.)

August 27, 1894, the local officers reported that two of the entrymen were reported dead; that Perri and Cole were no longer residents of Colorado; and that their whereabouts could not be ascertained. Whereupon the entry was held for cancelation by the General Land Office October 4, 1894, and canceled by it January 24, 1895. (Rec. p.p. 3+4)

June 10, 1897, Rudolph Hoffeld by his attorney in fact

made application for repayment of the purchase money paid on said land under the provisions of the act of June 16, 1880 (21 Stats. 287). He also filed an affidavit showing the loss of the duplicate receipt and reconveyed the above described land to the United States. Subsequently he died and J. Henrietta Hoffeld, the plaintiff herein, was appointed his ~~administratrix~~ executrix. The application was denied on November 4, 1897, and again refused on appeal to the Secretary of the Interior on December 11, 1899, he claiming that said application did not come within the provisions of the act of June 16, 1880, for the reason that the entry could be confirmed. (Rec. p.p. 4 & 5)

June 5, 1900, plaintiff commenced an action against the United States for said $3,200 by filing her petition in the Court of Claims. (Rec. p. 1.)

January 21, 1901, the Court of Claims dismissed the petition of the plaintiff on the ground that a purchaser at a judicial sale is not an assign within the purview of the act of June 16, 1880. (Rec. p. 5.) From which decision the plaintiff appealed to this court, assigning as grounds therefor the following errors:

1. In holding that, because the plaintiff's testator purchased the land, on account of which repayment is claimed, at a judicial sale, he was not an assign of the entrymen, within the purview of section 2 of the act of June 16, 1880, relating to the repayment of certain purchase money, fees and commissions paid on void entries (21 Stats. 287).

2. In not holding that the plaintiff was entitled to recover under section 2 of said act of June 16, 1880.

3. In finding as a fact that "neither the entrymen nor their assigns took any action in the premises, and accordingly the entry was canceled by the General Land Office on January 24, 1895," when said finding of fact is entirely immaterial and irrelevant.

4. In not rendering judgment for the plaintiff in the sum of three thousand two hundred dollars. (Rec. p. 10.)

In support of which appeal we submit the following:

ARGUMENT.

I.

The entry herein involved, was canceled by the Commissioner of the General Land Office, because it was allowed upon an insufficient affidavit. Its allowance was in violation of paragraph 32 of the circular of the coal land law. The affidavit was made by the attorney in fact instead of the entryman as required by that regulation. Hence the entry was erroneously allowed. The defect in the proof could not be cured, because some of the entrymen were dead and the others could not be found, therefore the entry could not be confirmed, and consequently the plaintiff is entitled to repayment under section 2 of the act of June 16, 1880, (21 Stats. 287), which reads in part as follows:

> "In all cases where homestead or timber culture or desert land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, *or where, from any cause, the entry has been erroneously allowed and can not be confirmed*, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office."

According to the construction of this act by the Secretary of the Interior repayment is allowed thereunder, when the local officers allow an entry upon insufficient proof, and their decision is subsequently reversed by the Commissioner of the General Land Office, and the entry canceled. In Duthan B. Snody, 1 Land Decisions, 532, the Secretary of the Interior held that where "*from any cause*" the entry has

been "erroneously allowed," repayment should be made. On p. 533 in the same decision it is said:

> "The fact that the acts of the entryman have contributed to or caused the erroneous entry ought not, under the statute, to deprive him of the remedy in cases where he has acted in good faith."

In George J. Ruskridge, 7 Land Decisions, 509, it is held that if an entry was innocently procured and allowed, under mistaken belief, entertained by the entryman and the officer allowing the same, that the facts in the case showed a sufficient compliance with the law as to ~~evidence~~ residence, when in truth such compliance is not shown, then the entry was "erroneously allowed" and the entryman is entitled to repayment on the cancelation of his entry.

The payment by the entrymen in the case at bar upon a final affidavit made by the attorney in fact, and the allowance of the entry by the land officials upon this affidavit, was the result of a mistaken belief entertained by both the entrymen and the land officers, hence the entry was "erroneously allowed" and the plaintiff is entitled to repayment in the light of the decision last cited *supra*. See, also, William Waible, 20 Land Decisions, 374. In J. H. Thompson, 10 Land Decisions, 34, it is held, where it is impracticable for the claimant to comply with an order requiring new final proof to be made, and good faith is apparent, repayment may be allowed.

The good faith of neither the entrymen nor assigns has been questioned in the findings of fact by the Court of Claims in the case at bar, hence, if the applicant in the case cited was entitled to repayment *a fortiori* is the claimant in the case at bar entitled thereto, as it was *impossible* to comply with the requirement of the Commissioner of the General Land Office in the case at bar and only *impracticable* in the case cited. not requires to perform physical impossibility. U.S. v. [illegible]

In George M. Dwyer, 26 Land Decisions, 284, it was held that an entry is "erroneously allowed" within the

meaning of the statute providing for repayment, if the General Land Office, in acting on the proofs accepted by the local office, finds said proof insufficient, and cancels the entry for that reason.

This was what was done in the case at bar and hence the entry was "erroneously allowed."

The construction given to the act of June 16, 1880, by the Secretary of the Interior, in the decisions cited *supra*, is entitled to great weight.

> Hastings and Dakota RR. Co. *vs.* Whitney, 132 U. S. 366.

In the case at bar the assignee was divested of his title by the act of the United States, and it would be unjust for the Government to retain both the land and money, hence, the statute provides for a refund of the money. The holding of the Secretary of the Interior that the entry could be confirmed in the case at bar was in conflict with his own regulations, the facts, and his previous decisions. The rule required the affidavit to be made by the original entrymen; they were dead or not to be found, and hence, this rule could not be complied with, without which it could not be confirmed. The Secretary only held thus in one other case prior to the case at bar, to wit, The Anthracite Mesa Coal Mining Co., 28 L. D. 551, which was overruled by the Court of Claims in May, 1900.

The amount of recovery is not fixed by the amount paid by the assignee to the assignor, but by the amount paid to the Government by the entryman, as the act of June 16, 1880, provides for the repayment of *purchase* money paid the Government, and hence the amount paid by the assignee is immaterial. Although a nominal consideration only is recited in the sheriff's deed to Hoffeld, the real consideration was much more than the amount paid the Government, but believing that plaintiff is only entitled to judgment for the amount paid the Government, no more and no less, we

did not deem it necessary to make proof of this fact, as we concede plaintiff is only entitled to recover $3,200.

II.

The Court of Claims does not hold that the plaintiff is not entitled to repayment because the entry was not erroneously allowed," or because "it could be confirmed," but in the case of the Anthracite Mesa Coal Co., to which we referred, *supra*, a case in which the facts were analogous to those in the case at bar, except as to the mode of assignment, it gave judgment for the complainant. Thus, in effect, holding that the facts in the case at bar entitled the plaintiff to a judgment, if the plaintiff had acquired title as assignee in a different manner. But it held that inasmuch as Rudolph Hoffeld purchased the land at a judicial sale he was not an assignee within the purview of the second section of the act of June 16, 1880.

III.

The word "assigns" in the second section of the act of June 16, 1880 (21 Stats. 287), means the grantees of the land.

(A.) After entry made the United States parts with the complete title to the land included therein, which vests in the entryman.

This court in the Wisconsin Central Railroad Company *vs.* Price County et al., 133 U. S. 496, held: After public lands have been entered at the land office and a certificate of entry obtained they are private property, the Government agreeing to make a conveyance as soon as it can, and in the meantime *holding the naked legal fee in trust for the purchaser*, who has the equitable title. The court in that case, speaking through Mr. Justice Field, quoted with approval the case of Carroll *vs.* Safford, 3 How. 441, and said, *inter alia*:

> "It is said the fee is not in the purchaser, but in the United States until the patent shall be issued.

This is so, technically, at law, but not in equity. The land in the hands of the purchaser is *real estate, descends to his heirs*, and does not go to his executors or administrators."

Again:

"Lands which have been sold by the United States can in no sense be called the property of the United States. *They are no more the property of the United States than lands patented.*"

In Hastings and Dakota RR. Co. *vs.* Whitney, 132 U. S. 361, it is held that after entry and before patent the land is private property. The court say:

"The fact that such an entry may not be confirmed by the land office on account of any alleged defect therein, or may be canceled or declared forfeited on account of non-compliance with the law, or even declared void, after patent has issued, on account of fraud, in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of the public lands."

Again, on pages 363–4:

"But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects by the Commissioner, or on appeal, by the Secretary of the Interior; or, as is often the practice, the entry must be suspended, a hearing ordered and the party notified to show by supplemental proof a full compliance with the requirements of the department; and on failure to do so the entry may then be canceled. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. *So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from*

> *the public* domain, and therefore precludes it from subsequent grants."

In the case at bar, the legality of the entry of Jones et al. had been passed upon by the officials of the United States Land Office at Gunnison, Colo., and hence it segregated the land included in said entry from the public domain, *i. e.*, took title out of the United States and vested it in the entrymen, and continued said title in them and their grantees, until more than six years after Hoffeld purchased the land at the judicial sale.

That the title vests in the entryman to the land included in the entry, see Carroll *vs.* Safford, 3 How. 460–1; Witherspoon *vs.* Duncan, 4 Wall. 219, and Deffeback *vs.* Hawke, 115 U. S. 405.

It thus appears that while the United States holds the *naked legal title* as trustee for the entryman, *the ownership of the land is in the entryman for all purposes* as long as the entry remains intact.

(B) The entryman having complete title to, and ownership of the land included in his entry has a right to transfer or assign it before the patent is issued. Myers *vs.* Croft, 13 Wall. 291.

His title to, and property in the land can be sold under an execution. Landes *vs.* Brant, 10 How. 371.

(C) The transferees, grantees or assigns of the land are the "assigns" named in that clause of the second section of the act of June 16, 1880, which reads as follows:

> "The money paid therefor shall be repaid to the person who made such entry, or to his heirs or '*assigns.*'"

Section 4 of the act of June 16, 1880 (21 Stats. 287), provides *inter alia*:

> "The Commissioner of the General Land Office shall make all necessary rules, and issue all necessary

instructions to carry the provisions of this act into effect."

In pursuance of this express authority of Congress, the Commissioner of the General Land Office, on August 6, 1880, issued instructions, which were approved by the Secretary of the Interior, the ninth clause of which reads as follows:

> "Those persons are assignees, within the meaning of the statute authorizing the repayment of purchase money, who purchase the *land* after the entries thereof are completed, and take assignments of the title under such entries prior to complete cancelation thereof when the entries fail of confirmation for reasons contemplated by the law. To construe said statute so as to recognize the assignment or transfer of the *mere* claim against the United States for repayment of purchase money, or fees and commissions, disconnected from a sale of the land or attempted transfer of title thereto, would be against the settled policy of section 3477 of the Revised Statutes." (Copp's Land Owner Vol. 7. p. 91.)

In the circular of the General Land Office of 1899, p. 106 it is said:

> "*Assignees of land* who purchase after entry are, in general, deemed entitled to receive the repayment when the lands are found to have been erroneously sold by the Government."

The Commissioner of the General Land Office and the Secretary of the Interior have continued to hold that the word "*assigns*" in said act means *grantees of the land*, from the passage of the act up to the present time.

This uniform construction by this Department justifies this court in accepting it.

Edwards *vs.* Darby, 12 Wheat. 210.
United States *vs.* Philbrick, 120 U. S. 52–59.
Robertson *vs.* Downey, 127 U. S. 607, 613, and
The United States *vs.* Healey, 160 U. S. 136.

If the uniform interpretation of a statute by a Department should be accepted, *a fortiori* should it be accepted when made in compliance with an express authority given by Congress in the act construed.

The First Comptroller of the Treasury held that the word "assigns" in that act meant the assignees of the land.

> 2 Lawrence, 264–6.
> See, also, Ely *vs.* Land Commissioner, 49 Mich. 21.

The language of the act itself clearly shows that the grantees of the land are meant by the word "assigns." The second section provides *inter alia:*

> "Upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claim to said *land,*" etc.

That is, the applicant must do this as a condition precedent to his receiving the repayment of the purchase money. The departmental regulation to carry this provision into effect reads as follows:

> "The reconveyance to the United States must conform in every particular to the laws of the State or Territory in which the land is located relative to *transfers of real property.*"
>
> Circular of the General Land Office of 1899, p. 106.

It is clear that Congress would not have required the assignee of a *claim* to relinquish the *land.* This statute is too plain to need comment.

The fact that the construction heretofore given to the word "assigns" has become a rule of property is a cogent reason for continuing and maintaining it.

We submit that the conclusion can not be escaped that the "assigns" named by Congress in that act are the grantees of the land.

IV.

The fact that an entryman has complete title to the land; *that he has a right to sell it* before patent, and that the purchaser or assign is entitled to repayment, clearly gives the right of repayment to a purchaser at a judicial sale. Land included in an entry is the subject of sale under an execution.

Landes *vs.* Brant, 10 How. 371.

In that case such sale was authorized by State statute. The sale to Hoffeld in the case at bar was authorized by State statute.

See Mill's Annotated Statutes of Colorado of 1891, Secs. 3606, 3608, 3613 and 3617.

The land being subject to execution sale, all estate therein was transferred to Hoffeld by operation of law.

Remington *vs.* Linthicum, 14 Pet. 92.

Not only the land, but all covenants of title passed to him by the sheriff's deed.

Rorer on Judicial Sales, Sec. 777.

A purchaser at a judicial sale of land before patent has been issued acquires the same title he would acquire by a quit-claim deed from the judgment debtor.

Landes *vs.* Brant, 10 How. 371.

If a purchaser under a quit-claim deed is an assign within the meaning of the act of June 16, 1880 (and this is not disputed by the Court of Claims), under the authority last cited, *supra*, a purchaser at a judicial sale would be such assign.

When Hoffeld purchased at the judicial sale, November 10, 1887, the entry of Jones et al., made May 28, 1886, and

conveyed by them, May 29, 1886, to the Ohio Creek Anthracite Coal Company, was intact and the title was good, and remained so until January 24, 1895, the date of the cancelation of the entry.

> Hastings and Dakota RR. Co. *vs.* Whitney, 132 U. S. 361.

Hoffeld having title to the land at the date of the cancelation of the entry is the *assign* entitled to repayment.

> "The applicant must make affidavit that he has not transferred or otherwise encumbered the title to the land and that the same has not become a matter of record."
>
> Circular of the General Land Office of 1899, p. 105.

It is apparent that such affidavit can only be made by the owner of the land at the date of the cancelation of the entry.

The Court of Claims, in its decision of January 21, 1901, says:

> "The right to reimbursement by the terms of the statute is confined to the person who made the entry, his heirs or *assigns*, and it does not inure to, and is not made applicable to any other person. Whatever may be the rights of the original entrymen, can it be said that the purchaser at a judicial sale is in such privity of contract or statutory obligation as to entitle him to recover on failure of title because of the cancelation of the entry? The doctrine of *caveat emptor* applies in all its force to a judicial sale, and the purchaser at such a sale buys the title or estate which the defendants in execution may have without the rights and benefits of covenants of warranty which inure to the ordinary purchaser. 15 Ill. 395; 25 Ala. 626; 2 Ohio N. S. 36. The claim of the plaintiff must be determined and measured by the statute which authorizes the refunding of the money. *The claim is purely of statutory obligation without any of the elements of a contract*

or covenant, and must be brought clearly within the terms of the statute before any recovery can be had." (Rec. p.p. 6+7)

We concur in that part of the decision which holds the plaintiff's right must be measured by the statute; but we most respectfully submit that the fact that a purchaser at a judicial sale buys *caveat emptor* in no wise affects his right to the benefit of said act. No provision can be found in that act which either in express terms or by implication limits the right of repayment to the grantees in a warranty deed. Neither the letter nor spirit of that act warrants any such construction. Such an interpretation is not only not warranted either by the language or the purpose of the act, but would be an unjust discrimination against purchasers who did not derive their title through a warranty deed. If the equities of the purchasers were to be considered in construing the word *assigns*, it would be more equitable to include purchasers at judicial sales and exclude purchasers under a warranty deed, because the latter would have a remedy on the covenants of the deed and the former would not.

Section 10 of the Regulations and Instructions of the Commissioner of the General Land Office of August 6, 1880, relating to this act, provides (Copp's Land Owner, Vol. 7, p. 91):

> "Where applications are made by assignees, the applicants must show their right to repayment by furnishing properly authenticated abstracts of title, or the original deeds or instruments of assignment, or certified copies thereof, *and also show by affidavit or otherwise that they have not been indemnified by their grantors or assignors for the failure of title*, and that a title has not been perfected in them by their grantors through other sources."

This regulation has been in force since August 6, 1880, or during the entire time the Land Department has admin-

istered this act. This regulation negatives the position of the Court of Claims, that a purchaser at a judicial sale is not entitled to repayment because the doctrine of *caveat emptor* applies.

The regulation specially provides for paying those not indemnified.

We admit, however, that all assigns are included, without regard to the character of the sale or the mode of conveyance, and that this regulation does not exclude purchasers under warranty deeds, but refers only to special indemnity.

Recognizing the injustice of the Government retaining both the land and the money, Congress provided that where title to the land was resumed by the Government, the money paid therefor should be repaid to the entryman, and where the land had been assigned the *assign* was entitled thereto, evidently because it would be unjust to allow the entryman to retain the consideration paid him by the assign and also to receive the repayment from the Government. A purchaser at a judicial sale, where the entry is canceled, has no right of action against his grantor, because the doctrine of *caveat emptor* applies; but he has a right of action against the Government, because it is given to him by the act of June 16, 1880, to recover *the amount the entryman paid the Government*—not the amount he paid his assignor. The purchaser under a warranty deed can not maintain an action against the Government on the covenants of the deed.

This right would inure to him only against his grantor, whose liability would be lessened by the amount refunded to the grantee by the Government, but his right against the United States is acquired by the act of June 16, 1880, just as the purchaser at the judicial sale acquires his right.

In both cases the land is bought, in both cases after sale the title fails, and in both cases the statutory right of repayment is based upon failure of title.

In the decision of April 8, 1901, denying the motion for a new trial the court say:

> "A grant or assignment primarily implies a grant or an assignor, and not the mere transfer of title by operation of law." (Rec. p. 8)

This court, in Goodman *vs.* Niblack, 102 U. S. p. 500, in effect held that the use of the words "*transfer or assign*" was broad enough in meaning to include an assignment by operation of law as well as by the act of the party unless from the purpose of the act a different meaning could be gathered.

In speaking of the provisions of section 3477 R. S., forbidding the assignment of claims against the United States, the court said:

> "Both these considerations as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the Government, and not the parties to the assignment. Erwin *vs.* United States, supra, decided at the same term as Spofford *vs.* Kirk, is suggestive on this point. It was there held that the claim of a bankrupt against the United States passed by the assignment in the bankruptcy proceeding to his assignee, and that the latter, and not the original claimant was the proper person to sue in the Court of Claims. The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute aimed, said the court. The language of the statute 'all *transfers and assignment* of any claim upon the United States, or any part thereof, or any interest therein *is broad enough* [if such were the purpose of Congress] *to include transfers by operation of law, or in bankruptcy, and we said it did not include one by will.*' The obvious reason of this is that there can be no purpose in such cases to harrass the Government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made. In what respect does the voluntary assignment for the benefit of creditors, which is made by an insolvent debtor of *all* his

> effects, which must, if it be honest, include a claim against the Government, differ from the assignment which is made in bankruptcy? There can be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the Government can be embarrassed by such an assignment. The claim is not specifically mentioned, and and is obviously included only for the just and proper purpose of appropriating the whole of his effects to the payment of *all* debts. We can not believe that such a meritorious act as this comes within the evil Congress sought to suppress by the act of 1853."

It thus appears that this court regards the word *assigns broad enough to include assigns by operation of law* unless from the nature of the act the intention can be gathered to limit it to *voluntary* assigns. In the case cited it was limited to voluntary assigns because it was not necessary to extend it to assigns by operation of law to suppress the evil, and also for the reason that to do so, would work an unneccessary hardship upon the latter class of *assigns*. In the light of the doctrine announced in the case last cited *supra*, the word *assigns* in the act of June 16, 1880, is broad enough to include assigns by operation of law, as well as by the act of the parties and it will be so construed unless it is clear that Congress intended to limit it to assigns by the act of the parties. It can not be contended that it would be necessary to so limit it, because to do so would be sufficient to suppress any evil, as there is no evil to suppress. It can not be contended that it should be so construed to give it an equitable construction, as the greater equities would be possessed, in all probability, by the assigns by operation of law, and hence it would be inequitable to so construe it. It contains no prohibitory clause that demands such a construction in order to save any rights, and it imposes no obligation upon the assign that requires such a construction to protect him. No such construction is necessary to protect the Gov-

ernment from imposition. The rights of the Government are as fully guarded in giving the *broad* as the *narrow* meaning to the word. The purpose of Congress to refund the purchase money to *all* owners of land to which the Government has resumed title, is only carried out by giving the *broad* meaning to the word *assign*. Justice and equity are better subserved and promoted by *including* than *excluding assigns by operation of law*. No reason appearing for limiting the word "*assigns*" used in the act of June 16, 1880, to voluntary assigns, either from the purpose of the act or the condition of the assigns, it is conclusive, in the light of the authority last cited, *supra*, that it should be read to include all assigns—by voluntary act—and operation of law.

There is no authority to *import into this statute the word voluntary*.

In Newhall *vs.* Sanger, 92 U. S. 765, the court say:

> "This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means *lawfully* claimed, but there is no authority to import a word into a statute to change its meaning."

It is conclusive that the word *assigns* in the act of June 16, 1880, taken in its ordinary acceptation as well as from the undoubted intention of Congress, should include both assigns by the act of the parties and *by operation of law*.

The Court of Claims in the decision of April 8, 1901, again say:

> "The second section of the act provides as follows: 'Upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land,' etc.
>
> "Does not this ~~patent~~ clause clearly indicate that Congress did not intend to extend the meaning of 'his assigns' so as to include a purchaser at an involuntary, forced, or judicial sale? Such purchaser would not have the 'duplicate receipt' to surrender to the Government. (Rec. p. 8.)

"And such surrender is, by the act, made as essential as the relinquishment of all claims to the land. The person who made the entry, his heirs or assigns, voluntarily assigning, whether immediate or mediate, would presumably have the duplicate receipt, but the purchaser at the forced sale would presumably not have it. This prerequisite makes it very evident that purchasers at judicial sales are not his assigns of the land within the purview of the act."

Again:

"The phrase 'his heirs or assigns' was evidently used in the act as including only such persons as would have in their possession the duplicate receipt to surrender. The language of the act limits the privilege to such transferees of the lands as are his transferees holding the duplicate receipt and prepared to surrender it." (Rec. p.p. 8-9.)

Whether purchasers at judicial sales ordinarily receive the duplicate receipts or not we have no means of learning at this time, but we do know that Hoffeld had the duplicate receipt in the case at bar, and that he did not surrender it because it was destroyed by fire, proof of which was duly made according to the requirements of the department. See findings of fact by the Court of Claims. The departmental regulations require proof of loss or destruction if the receipt can not be surrendered. This certainly is a sufficient compliance with the law where the duplicate receipt is lost or destroyed. And we apprehend, if for any reason it appeared that the applicant was wrongfully deprived of the possession of the duplicate receipt, proof of that fact would entitle him to repayment.

When Hoffeld purchased the land at the judicial sale he was entitled to the duplicate receipt. It was a muniment of his title. If the entry had not been canceled he was entitled to the patent. The title passing out of the Government by it would inure only to his benefit. He only would have an interest in its issuance, but before he could

procure such patent from the Government he must surrender the duplicate receipt or prove its loss or destruction, according to the regulations of the Land Department. Would the court hold that because the judgment debtor, who, having no further interest in the land, refused to deliver the duplicate receipt, the purchaser at the judicial sale would lose his land? Would not proof of the refusal to deliver such receipt by the said judgment debtor be sufficient proof of loss to justify the delivery of the patent to such purchaser? Would not a remedy be afforded by the courts for him to recover such receipt in an action of replevin from said judgment debtor? But, in any event, proof of his failure to obtain the receipt after exhausting his remedy would be sufficient to entitle him to the patent and if the entry was canceled, to repayment. This same difficulty might be encountered by an assign claiming under a voluntary deed. Suppose by inadvertence or by the ~~continuance~~ connivance of the grantor in a voluntary assignment the duplicate receipt was not delivered, and subsequently the entry was canceled, whereupon said grantor refused to deliver the duplicate receipt. The grantee, in such an event, would have no better means of securing said receipt than would the purchaser at a judicial sale. Would it be contended for one moment that such grantee would be deprived of his patent or repayment simply because he was unable, after exhausting all of his remedies, to procure said receipt? Certainly not.

The court in arguing that the possibility that the purchaser at a judicial sale might not have the duplicate receipt is an evidence that such purchasers were not entitled to the benefits of the act of June 16, 1880, overlooked the fact that this argument led them into a difficulty from which it is impossible to be extricated, without a clear violation of the plain and express terms of that act.

The court by denying the right of repayment to the purchaser at the judicial sale, left that right in the judgment

debtor. If that sale was not an assignment within the purview of the act certainly the right of repayment remained in the debtor.

The act of June 16, 1880, provides that the applicant for repayment must relinquish all claim to the *land*, and the departmental regulation thereunder requires a deed duly executed therefor according to the laws of the State or Territory in which the land is located. When the land herein involved was sold at judicial sale all title of the judgment debtor thereto passed out of it into Hoffeld, if the proceedings were in all respects according to law and this is not questioned. How then could the judgment debtor reconvey this property to the United States? Is it not a fact that the only person who could deed this property to the United States was Hoffeld? He did so reconvey and he is the only party that the land department required to reconvey. He was not only the only party that could convey and that was required to convey, but his conveyance alone would be of any benefit to the United States, as the deed of any other party could convey no title to the Government. It is apparent that the loss or absence of a duplicate receipt could be easily explained and accounted for by the party entitled thereto, but the fact that title had passed out of the applicant would prevent him from complying with the express provisions of the act of June 16, 1880, and no explanation could cure such defect. The applicant is required by the Department to furnish an abstract of title, to show that title came to him and did not pass out of him. This was done by Hoffeld in the case at bar, but could not have been done by the judgment debtor. The conclusion is irresistible that the "*assigns*" meant in the act of June 16, 1880, include those who acquire title by a warranty, quit claim, sheriff's or any other deed that would convey the title of the entryman to the land, and who owned the land at the date of the cancelation of the entry or the time when the United States resumed title to the land.

Again, in the decision of April 8, 1901, the court say:

> "Suppose the entryman had, on the day before the rendition of the judgment or the sale under the execution, sold and transferred to a third person, conveying to such person all right and title to the land, and the deed had not been placed on record on the day of the sale, and the judgment creditor had neither constructive nor actual notice of such sale or transfer, can it be said that as against the innocent purchaser from the entryman the purchaser at the sale would take, under the act, as against such purchaser from the original entryman?" (Rec. p. p. 9 + 10.)

We concede that if an entryman made two conveyances for the same tract, that the assignee in that conveyance which carried the title would be the assign within the purview of the act of June 16, 1880. We can not, however, conceive of how the case supposed could in anywise affect the question, as to whether the purchaser at a judicial sale is an assign within the purview of that act. Of course, if title passes out of the judgment debtor before judgment, a purchaser at a judicial sale might acquire no title to the land, and hence would not be the assign entitled to repayment. But this is not the fact in the case at bar. It is not contended that the land herein involved had been sold to any other party or parties at any time either before or after either the judgment or sale; and hence the hypothetical case has no application to the case at bar. If land was sold twice by a warranty deed, the party receiving the title would evidently be entitled to repayment. The mere fact that one was a warranty and the other a sheriff's deed would give the purchaser who did or did not receive the title no less or greater rights against the Government under one form of deed or sale than under the other. The lawful sale under either deed would convey all the right, title and interest the grantor possessed, which is all that is required to entitle the assign to repayment under that act.

The Court of Claims cites Breading *vs.* Boggs, 20 Penna.

State 33, to support its holding that assigns by operation of law were not included in the word "assigns" in the act of June 16, 1880. In that case a judgment was obtained against a firm in favor of a trustee for the benefit of certain named creditors. This judgment was attacked by a subsequent judgment creditor on the ground that it was a violation of the act of 17th April, 1843 (Sess. Laws, Penn. of 1843, p. 273), and the proviso of the 4th section of the act of 16th of April, 1849, (Sess. Laws, Penn. 1849, p. 664) forbidding debtors unable to pay their debts from preferring creditors. The court in that case held that the judgment was not an assignment. An assignment for the *benefit of creditors* is commonly understood to mean a *voluntary* assignment.

Am. & Eng. Ency. of Law, (2d Ed.) Vol. 3, p. 6, and authorities cited.

Said act of the 17th of April, 1843, provides that such assignments shall be subject in all respects to the laws in force relative to *voluntary* assignments. In that case the interpretation of the word was put upon its use in an act forbidding a preference of creditors by the debtor. A judgment obtained by the diligence of a part of the creditors was not the expression of a preference by the debtor, but a preference by operation of law, which was not forbidden by the statute, and therefore that judgment was held not to be an assignment within the meaning of that act, *i. e.*, it was not a *voluntary* assignment. Nor was the execution of the warrant of attorney to confess that judgment and assignment within the purview of the act of the 17th of April, 1843, because it was no attempt to transfer *all* of the property of the debtor which was necessary in order to be an assignment within the meaning of that act.

Worman *vs.* Wolfersberger's Executors, 19 Penn. State 61.

But the word assigns in the act of June 16, 1880, was used in no such sense. There was no prohibition in that act against *voluntary* assignments which would require its meaning to be limited to the act of the parties. On the contrary, the right to assign land covered by an entry has been recognized by this court both as to *voluntary* assignments (Myers *vs.* Croft, 13 Wall. 291), and to assignments by *operation of law* (Landes *vs.* Brant, 10 How. 371.) This court has also defined the word "assigns," when unlimited by either express words or the manifest intention of Congress to be *broad* enough to include both *assigns by operation of law* and by the act of the parties. Goodman *vs.* Niblack, 102 U. S. 560, cited *supra.*

The case of Doe *vs.* Bevan, 3 Maule and Selwyn, p. 353, cited by the Court of Claims, involved a lease wherein the lessee covenanted that he would not assign. The lease was sold by the assignee in bankruptcy of the lessee. The court held that this was not a breach of the covenant as it was an assignment in law. The reason for this decision must be found in the fact that the lessee should not be held responsible for any act other than *his own*, unless he by express terms bound himself therefor. To have given the word assigns in that instrument its broadest meaning would have undoubtedly worked a great hardship upon the lessee or his creditors. But to hold that the word "assigns" in the act of June 16, 1880, includes assigns by operation of law imposes no hardship upon anyone. It puts all assigns upon an equality, giving to each a return of the purchase money where he loses the land. It gives the purchasers at a judicial sale the same rights it gives to the purchasers at voluntary sales. It was the manifest purpose of Congress to reimburse such grantees or assigns for the loss incurred by them by reason of the failure of title.

Certainly it would not have been either equitable or just to refund the money to the purchaser under a warranty deed to reimburse him for his loss of the land, and refuse

to reimburse the purchaser at a judicial sale who had lost the land. It would not be in accord with natural justice or equity to forbid the entryman who had sold his land and given a warranty deed therefor from receiving the repayment of the purchase money, and to allow him to receive such repayment where his land had been sold to pay an honest debt. The clear reasons that must have governed Congress in enacting this statute forbid a narrow construction. They demand the usual and broad meaning of the word assigns.

Inasmuch as the word "assigns" is used in said act without any limitations, express or implied, it is conclusive that it included *all* "assigns," or grantees claiming under any form of deed or sale.

Goodman *vs.* Niblack, 102 U. S. p. 560.

We most respectfully submit that by no refinement of reasoning or metaphysical distinction can it be made to appear that the purchaser at a judicial sale has other or different rights under the second section of the act of June 16, 1880, than a purchaser at any other sale. When it is admitted that the "assigns" meant by that act are the grantees of the land, it must be conceded that it embraced all assigns of land without regard to the mode of sale or conveyance.

We respectfully request that the judgment of the Court of Claims be reversed, and that this court will direct it to enter judgment for the plaintiff in the sum of three thousand two hundred dollars.

Respectfully submitted.

Robt. ANDREWS & ANDREWS,

Attorneys for Plaintiff.